No. 95-1232

Supreme Court, U.S.
FILED
MAY 16 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,
Petitioner,
v.
ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, COASTAL GAS MARKETING COMPANY, ANR PIPELINE COMPANY, AND COLORADO INTERSTATE GAS COMPANY, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

REBECCA H. NOECKER
KAREN L. PAULEY
P.O. Box 1087
Colorado Springs, CO 80944
(719) 520-4207
Counsel for Amici Coastal Gas Marketing Co., ANR Pipeline Co., and Colorado Interstate Gas Co.

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Amicus Chamber of Commerce of the United States of America

JAN S. AMUNDSON
1331 Pennsylvania Avenue, N.W.
Suite 1500
Washington, D.C. 20040
(202) 637-3055
Counsel for Amicus National Association of Manufacturers

WALTER HELLERSTEIN *
University of Georgia Law School
Athens, Georgia 30602
(706) 542-5175

CARTER G. PHILLIPS
PAUL E. KALB
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Amici Curiae

May 16, 1996

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

18 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	4
A. Traditional Regulation Of The Natural Gas Industry: 1938-1978	4
B. The Movement Toward Deregulation And Competition: The Natural Gas Policy Act Of 1978	5
C. The Contemporary "Regulatory" Framework: The Triumph Of Free Competition	6
SUMMARY OF ARGUMENT	8
ARGUMENT	9
BY FAVORING PURCHASES OF GAS FROM LOCAL DISTRIBUTION COMPANIES OVER PURCHASES OF GAS FROM OUT-OF-STATE SELLERS, OHIO'S USE TAX VIOLATES THE COMMERCE CLAUSE'S BAR AGAINST DISCRIMINATORY TAXES AND UNDERMINES FEDERAL NATURAL GAS POLICY	9
A. Ohio's Tax Exemption For Purchases From In-State But Not From Out-of-State Sellers Violates First Principles Of Commerce Clause Jurisprudence	9
B. Federal Natural Gas Policy Reinforces The Commerce Clause Proscription Against Taxes Providing A Competitive Advantage To Taxpayers Engaged In Local Rather Than Interstate Commerce	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

American Trucking Ass'ns v. *Scheiner*, 483 U.S. 266 (1987) 10
Associated Indus. v. *Lohman*, 114 S. Ct. 1815 (1994) 10
Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263 (1984) 9, 10, 11
Boston Stock Exch. v. *State Tax Comm'n*, 429 U.S. 318 (1977) 10, 13
Chemical Waste Management, Inc. v. *Hunt*, 504 U.S. 334 (1992) 9
Dean Milk Co. v. *City of Madison*, 340 U.S. 349 (1951) 11
FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) 4
Fulton Corp. v. *Faulkner*, 116 S. Ct. 848 (1996) 9
Halliburton Oil Well Cementing Co. v. *Reily*, 373 U.S. 64 (1963) 9
Maryland v. *Louisiana*, 451 U.S. 725 (1981) 11
McLeod v. *J.E. Dilworth Co.*, 322 U.S. 327 (1944) 12
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959) 8, 10
Pennsylvania v. *West Virginia*, 262 U.S. 553, *aff'd on reh'g*, 263 U.S. 350 (1923) 4
Schneidewind v. *ANR Pipeline Co.*, 485 U.S. 293 (1988) 12
Transcontinental Gas Pipe Line Corp. v. *State Oil & Gas Bd.*, 474 U.S. 409 (1986) 6, 12

STATUTES, LEGISLATIVE MATERIALS AND OTHER AUTHORITIES

Natural Gas Act of 1938, 15 U.S.C. §§ 717-717w (1988) 4
Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.* (1988) 5
Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989) 7
H.R. Rep. No. 29, 101st Cong., 1st Sess. (1989) 7

TABLE OF AUTHORITIES—Continued

Page

Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, 57 Fed. Reg. 13267 (Apr. 8, 1992) 8, 11, 13

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, 50 Fed. Reg. 42408 (Oct. 18, 1985) 7

Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions, Order No. 380, FERC Statutes and Regulations ¶ 30,571 (1984) 6, 7

Joseph Fagan, *From Regulation To Deregulation: The Diminishing Role Of The Small Consumer Within The Natural Gas Industry,* 29 Tulsa L.J. 707 (1994) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1232

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, COASTAL GAS MARKETING COMPANY, ANR PIPELINE COMPANY, AND COLORADO INTERSTATE GAS COMPANY, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amicus Chamber of Commerce of the United States of America ("Chamber") is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents the interests of more than 215,000 companies, as well as several thousand state and local chambers of commerce and trade and professional organizations. The Chamber regularly represents the interests of its members in critical matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

Amicus National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

Member companies of the Chamber and the NAM are representatives of that part of the nation's business sector which is most directly affected by state taxation of interstate operations. Members of the Chamber and/or NAM are involved in the natural gas industry, and many other members are companies, like the petitioner, which purchase natural gas to run their operations. The Chamber and the NAM also represent other companies well beyond the specific industries involved in this case which are equally disadvantaged by state taxation schemes that discriminate against interstate commerce.

Amici curiae Coastal Gas Marketing Company ("CGM"), ANR Pipeline Company ("ANR") and Colorado Interstate Gas Company ("CIG") are affiliated companies engaged in the gathering, processing, transportation, marketing, and purchase and sale of natural gas in interstate commerce. CGM is a gas marketing company that purchases and sells natural gas in interstate commerce. ANR and CIG are interstate natural gas pipeline companies that gather, process, and transport natural gas for hire in interstate commerce. CIG also purchases and sells natural gas at the wellhead, but because of federal policy, it is prohibited from transporting its own gas on its pipeline facilities.

Each of the *amici* has an immediate interest in the outcome of this case. *Amici* Chamber and NAM have members who, like the petitioner, purchase gas in Ohio, and

who therefore are subject to the Ohio taxation scheme. As an interstate marketer without distribution facilities of its own, CGM, which sells to end-users including petitioner, is placed at a competitive disadvantage to local distribution companies ("LDCs") when it seeks to sell directly to Ohio customers because, unlike LDCs, it cannot sell gas on a tax-exempt basis. Only LDCs are eligible for the tax exemption here because it is limited to sales by those who both transport and sell the gas that they deliver to Ohio customers. As interstate natural gas pipelines, ANR and CIG are precluded under federal law from making sales of gas that they have transported. Consequently, the Ohio tax exemption puts them, as well as other interstate pipelines, at an economic disadvantage because, unless they transport for an LDC, the ultimate sale will not be tax-exempt, thereby eliminating or potentially eliminating many transportation customers such as end-users or marketers.

While all *amici* thus have a direct interest in the outcome of this case, their interests extend far beyond concern about its immediate outcome. *Amici*'s overriding interest in this case is the danger that it poses for the natural gas industry and consumers of natural gas. This case involves a state tax classification that effectively places a greater burden on interstate businesses than on their intrastate competitors. If such state tax classifications are allowed to stand—and Ohio is by no means unique in its tax classification scheme—they will tilt the level playing field in the natural gas market away from interstate and in favor of local commerce. *Amici* therefore have a strong interest in this Court's reversal of the decision below and a holding that strongly reaffirms that interstate participants in the national gas market should be on an equal footing with their local competitors.[1]

---

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.3 of the Rules of this Court.

STATEMENT

To appreciate *amici*'s concerns with Ohio's tax exemption for sales of natural gas made by LDCs, it is necessary to understand the present legal and economic structure of the natural gas industry and the historical background from which it emerged.

Natural gas has long been recognized as a vital resource providing millions of consumers with an inexpensive and environmentally responsible source of energy that can be found in abundant supply within the United States. *Pennsylvania* v. *West Virginia*, 262 U.S. 553, *aff'd on reh'g*, 263 U.S. 350 (1923). Because of its importance to the nation and the national economy, Congress and federal regulatory bodies have been deeply engaged in shaping federal policy concerning natural gas for more than half a century.

A. Traditional Regulation Of The Natural Gas Industry: 1938-1978

Initial efforts to regulate the natural gas industry were designed to assure the production and delivery of adequate supplies of natural gas at "just and reasonable" prices to consumers. In 1938, Congress enacted the Natural Gas Act ("NGA") to regulate the sale for resale in interstate commerce of natural gas. 15 U.S.C. §§ 717-717w (1988). The "heart of the new regulatory system" was the "fixing of 'just and reasonable' " rates for natural gas companies (both producers and pipelines) that were engaged in the sale for resale in interstate commerce of natural gas. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944).

The structure was simple. Producers would sell their natural gas in the production area to interstate pipelines at Commission-determined just and reasonable rates. Pipelines would transport their purchased gas and their own production to the city gate for sale to LDCs at Commission-determined just and reasonable rates, which

were designed to recover the pipelines' cost of gas, cost of transmission, and a reasonable rate of return.

Traditional regulation of the natural gas industry by the Federal Power Commission ("FPC") and its successor, the Federal Energy Regulatory Commission ("FERC"), thus focused primarily upon the "bundled sales" services provided by interstate pipeline companies. These "bundled sales" services typically embraced all of the services, apart from production, from obtaining gas at the wellhead to delivering it to the customer, including purchasing the gas from producers, gathering the gas from the wellhead and moving it to a processing facility, processing or treating the gas stream, transporting the gas in interstate commerce, storing the gas to meet peak demands, and selling the gas to LDCs.

B. The Movement Toward Deregulation And Competition: The Natural Gas Policy Act Of 1978

As a result of the early federal regulation of interstate gas prices, the intra- and interstate markets for natural gas became increasingly separate. Joseph Fagan, *From Regulation To Deregulation: The Diminishing Role Of The Small Consumer Within The Natural Gas Industry*, 29 Tulsa L.J. 707, 714-15 (1994). Producers naturally gravitated towards the intrastate markets which were not subject to FPC control to secure the higher returns available in those markets. *Id.* at 715. The oil price dislocations of the early 1970's, which caused an increase in demand for natural gas, further balkanized the market because prices for intrastate gas rose while the price of interstate gas remained at artificially low regulated levels. This, in turn, caused a shortage on the interstate market.

In 1978, Congress responded to the natural gas shortages in the interstate market by enacting the Natural Gas Policy Act ("NGPA"). 15 U.S.C. § 3301 *et seq.* (1988). The NGPA (i) created new statutory rates intended to provide investors with adequate incentives to

develop new sources of supply; (ii) started the process of decontrolling wellhead prices of natural gas; and (iii) broke down the existing barriers between intrastate and interstate markets for natural gas. The NGPA's aim was to permit a competitive wellhead market where market forces play a "more significant role in determining the supply, the demand, and the price of natural gas." *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986). The NGPA therefore radically changed a key aspect of the natural gas industry by beginning the elimination of Commission-determined prices for first sales of natural gas and replacing them with prices driven by the market.

C. The Contemporary "Regulatory" Framework: The Triumph Of Free Competition

In the years immediately following the NGPA, the supply of gas increased but demand decreased as a result of a national economic slowdown, conservation, and fuel shifting. This caused the price of new gas to plummet. The price of gas committed under the pipelines' long-term take-or-pay contracts with producers, however, did not change. As a result, LDCs—which were committed under provisions of their contracts with pipelines known as "minimum commodity bills" to pay for a minimum quantity of gas whether or not they actually took delivery—continued to pay prices for gas that were well above the market price at the wellhead. The FERC, concluding that minimum commodity bills "may inhibit natural gas price decreases that could otherwise result from competitive forces," responded by issuing Order No. 380. *Elimination of Variable Costs From Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, Order No. 380, FERC Statutes and Regulations ¶ 30,571, at 30,959 (1984). That Order eliminated minimum commodity bill provisions, and thereby freed LDCs to contract for the new low-priced supplies. According to the FERC, this Order was designed to further remove

market constraints, to allow greater competition, and to provide more accurate price signals to the wellhead, all leading to more reasonable prices for consumers. *Id.* at 30,969.

After freeing the LDCs from their old sales contracts with pipelines, the FERC became concerned that restrictions remained on transportation of the new low-priced gas. Thus, in 1985, it took the next significant step towards deregulation by issuing Order No. 436. *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, 50 Fed. Reg. 42408 (Oct. 18, 1985) ("Order 436"). Order 436 effectively required that pipelines become open access transporters—rather than merchants—of natural gas. Order 436 did not require pipelines to unbundle their sales services, but it did require them separately to identify the different services they offered, including bundled sales services, so that customers and shippers could contract for and bear the cost of those services actually needed. Accordingly, the transportation and sale of natural gas became distinct economic and commercial services. In that manner, pipelines and other gas merchants became direct competitors in the sale of gas to LDCs and to end-users, such as industrial consumers or gas-fired generators of electricity.

In 1989, Congress continued down the path of deregulation of and free competition in the natural gas industry by adopting the Natural Gas Wellhead Decontrol Act of 1989 ("Decontrol Act"). Pub. L. No. 101-60, 103 Stat. 157 (1989). That legislation amended the NGPA by repealing all remaining price controls in order to obtain more supplies at lower prices by creating competition among producers. H.R. Rep. No. 29, 101st Cong., 1st Sess. 6-7 (1989). The Act was designed to further the federal policy that no gas seller should have a competitive advantage over any other gas seller.

While the Decontrol Act reflected Congress's finding that the market for gas at the wellhead was sufficiently competitive to be deregulated, the FERC continued to be

concerned by what it perceived to be the anticompetitive impact of bundled transportation and sales by interstate pipelines. Thus, in 1992, it issued Order 636. *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 57 Fed. Reg. 13267 (Apr. 8, 1992) ("Order 636"). In that Order, the FERC required pipelines to unbundle gathering operations and costs from other operations and costs, such as transportation. The FERC made clear that the goal of the Order was to create a national gas market in which consumers and producers could meet anywhere on the pipeline grid to transact the most efficient deals possible so that the "public can realize the full benefits of competition at the wellhead." Order 636, 57 Fed. Reg. at 13269. In addition, the FERC emphasized that its goal was to "create a regulatory environment in which no gas seller has a competitive advantage over another gas seller." *Id.*

SUMMARY OF ARGUMENT

Ohio's tax exemption for purchases from certain in-state, but not from out-of-state, sellers violates settled principles of this Court's Commerce Clause jurisprudence. The tax preference accorded to purchases from certain in-state sellers will invariably induce purchasers of natural gas to deal with in-state rather than out-of-state sellers. The Ohio taxing scheme therefore "discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959).

The conclusion that Ohio's tax preference for purchases from LDCs violates familiar Commerce Clause principles is reinforced by considerations of federal natural gas policy. Congress and the FERC are now fully committed to unfettered competition among all participants

in the natural gas market. Ohio's taxing scheme, which favors LDCs over interstate gas marketing companies, undermines this policy by tilting the level playing field of the free market towards in-state participants in that market. State tax classifications like Ohio's, which effectively burden interstate participants in the natural gas industry vis-à-vis their local competitors, therefore frustrate federal energy policy at the same time that they offend elementary Commerce Clause norms.

ARGUMENT

BY FAVORING PURCHASES OF GAS FROM LOCAL DISTRIBUTION COMPANIES OVER PURCHASES OF GAS FROM OUT-OF-STATE SELLERS, OHIO'S USE TAX VIOLATES THE COMMERCE CLAUSE'S BAR AGAINST DISCRIMINATORY TAXES AND UNDERMINES FEDERAL NATURAL GAS POLICY.

A. Ohio's Tax Exemption For Purchases From In-State But Not From Out-of-State Sellers Violates First Principles Of Commerce Clause Jurisprudence.

No principle is more firmly embedded in this Court's Commerce Clause jurisprudence than the doctrine that the states may not impose taxes discriminating against interstate commerce. See, *e.g.*, *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848 (1996); *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992). Two equally well-established corollaries to this principle are that (1) a tax will be struck down as discriminatory under the Commerce Clause whether it discriminates in intent *or* effect, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270-71 (1984), and (2) even if the discrimination is inadvertent, it is constitutionally unacceptable because "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions," *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 70 (1963).

Under these settled precepts, Ohio's tax exemption for sales of natural gas confined to companies that "own or operate the transportation and distribution equipment and deliver the natural gas to consumers in Ohio," Pet. App. 3a, cannot conceivably pass muster. For a potential purchaser of natural gas faced with the question whether to purchase from an Ohio LDC, and thus free of sales and use tax, or, alternatively, to purchase the gas from an out-of-state seller, and pay a use tax on the gas, the choice is obvious. Assuming the price for the gas is the same, the purchaser will invariably choose to purchase from the local seller. The Ohio taxing scheme therefore "forecloses tax-neutral decisions," *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 331 (1977), and "discriminates against interstate commerce . . . by providing a direct commercial advantage to local business," *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959). In so doing, it "exerts an inexorable hydraulic pressure on . . . businesses to ply their trade within the State . . . rather than 'among the several States.'" *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 286-87 (1987).

The only defense offered to General Motors' claim of discrimination—that the state would tax purchases of gas from in-state as well as out-of-state marketers that own no distribution facilities—is really no defense at all. This Court has consistently repudiated the suggestion that a tax that discriminates against interstate commerce may escape constitutional condemnation if it discriminates in favor of only some, but not all, local commerce. In *Associated Industries* v. *Lohman*, 114 S. Ct. 1815 (1994), for example, the Court invalidated a discriminatory use tax scheme that favored some, but not all, in-state sales. Likewise, in *Bacchus Imports*, 468 U.S. at 263, this Court struck down a Hawaii statute that exempted a locally produced brandy, but not other locally produced liquors, holding that "the effect of the exemption is clearly dis-

criminatory, in that it applies only to locally produced beverages, *even though it does not apply to all such products.*" *Id.* at 271 (emphasis added). And in *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951), this Court struck down a milk inspection ordinance that favored some, but not all, in-state sellers. Indeed, as the Court declared in *Maryland* v. *Louisiana*, 451 U.S. 725, 759 (1981), "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates."

B. Federal Natural Gas Policy Reinforces The Commerce Clause Proscription Against Taxes Providing A Competitive Advantage To Taxpayers Engaged In Local Rather Than Interstate Commerce.

While the foregoing application of familiar Commerce Clause principles to Ohio's use tax scheme leaves no doubt that it fails to survive constitutional scrutiny, there is an additional reason why the exemption for purchases from local distribution companies—but not from out-of-state sellers—must be struck down. As explained above (see *supra* pp. 6-8), federal natural gas policy is now fully committed to unfettered competition among all participants in the natural gas market. The agency charged with overseeing our nation's natural gas policy has endorsed the creation of a national gas market "in which no gas seller has a competitive advantage over another gas seller," Order 636, 57 Fed. Reg. at 13269, and in which the "public can realize the full benefits of . . . competition," *id.*

The strong federal policy towards unbridled competition in the natural gas market, in which artificial advantages are not provided to one seller over another, reinforces the conclusion that the Commerce Clause bars Ohio's tax preference for local over out-of-state sellers. Examination of the impact of the Ohio decision on consumers, interstate pipelines and gas marketers, like *amici*,

demonstrates why it simultaneously offends both the Commerce Clause and federal energy policy.[2]

It is plain that Ohio's tax exemption for those who purchase gas from LDCs, but not for those who purchase gas from out-of-state sellers, discriminates against interstate commerce by skewing consumers' choices towards local sellers. This discrimination has a direct—and invidious—competitive impact upon consumers as well as interstate gas marketers and interstate pipelines such as *amici* CGM, ANR and CIG. Consumers are injured, of course, by the absence of an efficient, fully competitive market. Interstate gas marketers, like CGM, are placed at an economic disadvantage when they seek to compete with Ohio LDCs in selling gas to Ohio purchasers because the LDCs can sell the gas to those purchasers on a tax-free basis whereas the gas sold by the interstate marketer will incur an Ohio use tax. And interstate pipelines, like ANR and CIG, are placed at an economic disadvantage because, unless they transport for an LDC, the ultimate sale will not be tax-exempt, thereby eliminating or potentially eliminating many transportation customers such as end-users or marketers.

The discrimination that Ohio's taxing regime visits upon consumers, interstate pipelines and marketers not only violates the bedrock principles of Commerce Clause jurisprudence described above, it also frustrates federal natural gas policy for essentially the same reasons. Just as the "[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States," *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944),

---

[2] Congress intended through the NGA and the Decontrol Act comprehensively to regulate the sale of natural gas, leaving no room for the states to supplement federal law. It did so expressly to allow an unfettered marketplace for the sale of natural gas. *See, e.g., Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 300-03 (1988); *Transcontinental Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422-25 (1986).

so the federal natural gas policy is committed to the creation of a free competitive market in natural gas. And just as taxes that effectively burden interstate participants in that market more than local participants violate the Commerce Clause bar against taxes "favor[ing] local commercial interests over out-of-state businesses," *Boston Stock Exch.*, 429 U.S. at 334-35, so these taxes, which are a backdoor form of state regulation, undermine federal policy to "create a regulatory environment in which no gas seller has a competitive advantage over another gas seller," Order 636, 57 Fed. Reg. at 13269.

In short, federal natural gas policy reinforces Commerce Clause policy in condemning Ohio's taxing scheme. Because these two policies share the underlying purpose of maintaining a level playing field in which market forces can freely operate to the ultimate benefit of consumers, they are equally intolerant of a taxing regime like Ohio's which upsets that competitive equilibrium in favor of local economic interests and provides an advantage to certain competitors over others not by dint of their natural economic advantages in a free market but simply by the fact that they are in-state rather than interstate actors.

* * * * *

Reversal of the Ohio Supreme Court's decision is necessary to vindicate the underlying purposes of the Commerce Clause which are embodied in federal natural gas policy. Moreover, reversal is essential so that the Court can reaffirm the vital principle that all state taxation efforts that tilt the playing field in favor of local market participants are impermissible.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

REBECCA H. NOECKER
KAREN L. PAULEY
P.O. Box 1087
Colorado Springs, CO 80944
(719) 520-4207
Counsel for Amici Coastal Gas Marketing Co., ANR Pipeline Co., and Colorado Interstate Gas Co.

ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for Amicus Chamber of Commerce of the United States of America

JAN S. AMUNDSON
1331 Pennsylvania Avenue, N.W.
Suite 1500
Washington, D.C. 20040
(202) 637-3055
Counsel for Amicus National Association of Manufacturers

WALTER HELLERSTEIN *
University of Georgia Law School
Athens, Georgia 30602
(706) 542-5175

CARTER G. PHILLIPS
PAUL E. KALB
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Amici Curiae

May 16, 1996

* Counsel of Record